Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

MICHAEL E. BISHOP, Dr.

Petitioner,

v.

BAYLOR UNIVERSITY,

Respondent.

On Petition For Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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48 pp

QUESTIONS PRESENTED FOR REVIEW

1. What is the scope of protection of the Anti-Retaliation Provision of Title VII?

Courts have generally held that the "opposition" clause of the Title VII's anti-retaliation provision provides less protection that does the "participation" clause. However, the Ninth Circuit and the Eleventh Circuit have now adopted the position that the protections of the "participation" clause of the anti-retaliation provision of Title VII do not afford any protection at all unless an EEOC proceeding has been initiated. The Fifth Circuit and the Eighth Circuit have adopted the position that the neither the opposition nor the participation clause provides protection for someone who does not actively participate in opposing a discriminatory practice or in assisting a complainant. Yet the Seventh Circuit has held that "passive" opposition may be protected by both the opposition and participation clauses of the Title VII's anti-retaliation provision. In this case, the Fifth Circuit adopted the District court's reasoning that a "representative of management" cannot claim protection under the anti-retaliation provision of Title VII, even though the "representative" actively participated in matters related to an EEOC complaint and subsequent lawsuit. Petitioner requests this Court to clarify and resolve conflicts between circuit courts with respect to the scope of protection afforded under Title VII's retaliation clause in and effort to equalize the rights of employees similarly situated throughout the nation, including specifically employees whose positions may be classified as management positions or who may act as management representatives in matters relating to complaints alleging discrimination in the workplace.

QUESTIONS PRESENTED FOR REVIEW (CONT'D)

2. Assuming that this Court decides that Petitioner was protected from retaliation under the "opposition" and/or "participation" clauses of Title VII's anti-retaliation provision, the Petitioner requests the court to grant a de novo review of his summary judgment evidence applying the standards set forth in *Anderson v. Liberty Lobby*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510 (1986).

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CITATIONS OF OPINIONS AND ORDERS

The opinion of the United States Court of Appeals for the Fifth Circuit is not published, but it is reproduced in the Appendix. Although an unpublished opinion may not set precedent under Fifth Circuit Rule 47.5.4, the opinion may be cited as persuasive; and the Fifth Circuit's Opinion adopted the reasoning of the district court's Order, which found that Petitioner was not protected by the anti-retaliation provision of Title VII because Petitioner "was not engaged in protected activity." (Opinion, at p.7)

The opinion of the United States District Court for the Western District of Texas, Waco Division, regarding whether the case is removable is not reported, but it is also reproduced in the Appendix. The District Court's Judgment is also included in the Appendix.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered its judgment on March 13, 2001. The Supreme Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) as this is a petition for writ of certiorari for review of a judgment of a Court of Appeals.

STATUTES INVOLVED IN THE CASE

This case involves certain provisions of Title VII, 42 U.S.C. § 2000e-3. The pertinent portion is set forth below:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment...because he has opposed any practice made an unlawful employment practice by this title [42 U.S.C. §§ 2000e-2000e-17], or **because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.** (emphasis added)

STATEMENT OF THE CASE

Course of Proceedings and Disposition in the Courts Below

Petitioner ("Bishop") filed his Original Complaint in April of 1998, complaining, *inter alia*, that Respondent ("Baylor") had terminated his employment as Vice-President in violation of the anti-retaliation provision of Title VII. In August of 1998, Respondent ("Baylor") filed its First Motion for Summary Judgment, contending that Bishop's Original complaint was not filed timely. (R.29-240) On November 4, 1998, the District Court entered an Order denying Baylor's First Motion for Summary Judgment for the reason that the EEOC's actions relating to Bishop's case "clearly" gave rise to a claim of equitable tolling that defeated Baylor's claim that Bishop's complaint was untimely. (R.300-308)

On April 13, 1999, Baylor's Second Motion for Summary Judgment was filed.[1] (R.338) On July 1,

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[1] On December 4, 1998, Bishop and Baylor filed a Joint Motion to extend discovery deadlines and modify

1999, Bishop filed his Response to the Second Motion. Other pleadings related to Baylor's Second Motion were filed between July 13 and July 29, 1999. On April 4, 2000, the District Court granted Baylor's Summary Judgment and entered a take nothing Judgment on the same day. Bishop timely filed a Motion to Reconsider and/or Amend the Court's Order which was denied on May 24, 2000.

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the Court's scheduling order by one hundred and twenty (120) days.(R.329-331) The Motion was promptly granted by the Court on December 11th. (R.332-353) The Court's Modified Scheduling Order provided that dispositive motions should be filed and discovery should be completed on or before April 19, 1999, and a trial date of June 19th. On December 10, 1998, a state court entered an expedited scheduling order in another case between a Baylor employee and the university, setting a dispositive motion deadline of April 9th and a trial date of May 10th. Bishop repeatedly requested but was repeatedly denied any modification of the scheduling order in this case, despite the fact that his counsel, a solo practitioner, documented the extraordinary time that had been required to meet the deadlines of the expedited state court trial and pre-trial proceedings, which included four Baylor Motions for Summary Judgments, and a four and one-half week jury trial, beginning May 10th and ending June 9th. Bishop challenged the district court's refusal to grant Bishop the relief requested--particularly in view of the fact that the district court did not rule on Baylor's Motion for Summary Judgment until eight months after Bishop filed his Response to Baylor's Motion, but the Fifth Circuit denied Bishop's complaint that the trial court "abused its discretion" in regard to the scheduling order and the issue is not re-asserted in this Petition.

A timely Notice of Appeal was filed and the case was fully briefed before the Fifth Circuit, which entered its Opinion and Judgment affirming the District Court's judgment on March 13, 2001.

Statement of Material Facts[2]

Bishop was hired for the position of Chief of Staff for Baylor University by President Herbert H. Reynolds in March of 1991. He also held a tenure-track appointment as a professor in the Journalism Department, and he was granted tenure in 1994. Shortly thereafter, Bishop was made a Vice-President of the university in charge of the Office of Communications and Marketing. He also held a faculty appointment as a professor in the Journalism Department, and he was granted tenure in his faculty position in 1993. In 1992, the Chair of the Journalism

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[2] The district court's opinion gives a cursory overview of the facts in this case, based solely on excerpts of Bishop's deposition, some of which were misstated. However, a more detailed statement of facts, with documents corroborating the facts was submitted in Bishop's Affidavit(s) filed in support of his Response to Defendant's Motion for Summary Judgment. The facts stated in Bishop's Affidavit, including attached documents, were totally ignored by the district court and by the Fifth Circuit, which summarily adopted the district court's opinion, despite the fact that both the district and circuit courts were required to consider all evidence presented by the non-movant in a light most favorable to the non-movant and draw all inferences in favor of the non-moving party to ascertain if a reasonable jury drawing all inferences in favor of the non-moving party could arrive at a verdict in that party's favor. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510 (1986).

Department was scheduled to be considered for re-appointment by President Reynolds. Some of Bishop's faculty colleagues in Journalism requested that Bishop advise President Reynolds that there were problems in the Department and that the faculty was divided over the administrative practices and policies of the current Chair. Dr. Sara Stone, the only female faculty member, specifically complained that she was being unfairly treated in an effort to force her out of the department. A male colleague, Dr. Doug Ferdon, corroborated her complaint. Bishop advised President Reynolds that some of the faculty had problems with the current Chair, Dr. Loyal Gould, and that there was a problem that "might result in a lawsuit." Bishop did not identify the faculty by name or provide other specific information because the colleagues had approached him on a confidential basis. However, Bishop's summary judgment evidence showed that President Reynolds already knew about Dr. Stone's threat to bring a lawsuit against Dr. Gould because Dr. Reynolds' file included a copy of a letter from Dr. Gould dated June 17, 1991, and initialled by Reynolds on 7/10/81, stating: "I believe I am in potential trouble and I wish you to know of the matter. Thus the letters included with this mailing are for your information." One of the included letters was addressed to Dean Cooper, College of Arts and Sciences, and stated "When I failed to receive an answer from you to my May 13 letter...I called Professor Schmeltekopf [Provost] June 14 to tell him I had been told that Professor Mantooth [later "Stone"] was considering taking legal action against me and that, as the prospect of hanging concentrates a man's mind, the thought of a suit had concentrated my thinking ..." Despite Bishop's advice regarding problems in the Journalism Department, President Reynolds re-appointed Dr. Gould to chair the Department.

In the summer of 1992, after learning that Dr. Gould had been re-appointed Chair, Dr. Stone filed a Sexual Harassment

complaint against Dr. Gould with the university's Sexual Harassment Mediation Board ("SHMB"). The complaint was resolved by an agreement in the Fall of 1992, but Dr. Gould promptly breached the agreement. Dr. Stone reported the breach to the SHMB and also decided to file a complaint with EEOC. In December of 1992, Dr. Gould resigned as Journalism Chair and President Reynolds appointed Bishop as the acting Chair of the Department. Despite Dr. Gould's resignation, Dr. Stone persisted in asserting her EEOC complaint, although she cooperated with the university by giving a deposition stating her claims in January of 1993. In the spring of 1993, Bishop recommended that faculty changes needed to be made in the department, specifically that four journalism professors, including Dr. Gould should be encouraged to retire or resign. By the end of the spring, two professors had accepted retirement packages, one had resigned, and Dr. Gould had been named as the head of the Heinz-Keppler Institute at Baylor and he was allowed to continue to teach in the Journalism Department.

In the spring of 1994, after Dr. Stone filed a lawsuit in federal court, Baylor requested that Bishop meet with Dr. Stone, as the representative of Baylor, in an effort to resolve her complaint. Dr. Bishop agreed to do so, despite his reservations that he was being placed in a "lose-lose" situation because he believed that Dr. Stone's complaints had merit and he knew that President Reynolds did not agree. On March 7, 1994, after the first session with Dr. Stone, Bishop reported that an "agreement will not be either inexpensive nor easily achieved. I will pursue these discussions, if you desire; however, on further reflection, I recommend that you consider whether the services of a professional mediator might be productive...If you prefer for me to continue one-on-one discussions with Dr. Stone, it would be helpful for me to know the outside parameters of what the University is willing to consider in a possible settlement." On

March 30, 1994, Bishop reported "At your request, yesterday I talked with Dr. Sara Stone about our interest in receiving from her a 'bottom line' offer to settle her lawsuit.....Dr. Stone said ...that since she made an offer to settle during a meeting with you and Basil Thomson [university general counsel], that for her to now make an additional offer, not having received a response to her first offer, she 'would be bidding against herself.' She respectfully requests that Baylor respond with a written counter-proposal to settle, since we are not accepting her initial offer...You may prefer to go directly to professional mediation, and I continue to recommend that course as a highly appropriate option in this circumstance." Even though Bishop was never given any parameters for settlement, on August 5, 1994, he suggested that an offer be made that would include $750,000 for her and $90,000 for her attorney. President Reynolds emphatically wrote "NO" on his copy of Bishop's memo and Bishop was never asked to be involved in any mediative role thereafter.

Bishop testified, without contradiction, that at the time that Baylor asked him to meet with Dr. Stone, President Reynolds knew that he (Bishop) had very high regard for Dr. Stone and that he disagreed with President Reynolds' perception that Dr. Stone's complaints had no merit. As evidence supporting his position, Bishop submitted a copy of a letter that he had sent to Journalism Alumni and Friends in December of 1993, after the disputes with the four male faculty members had been resolved, wherein Bishop stated that "Sara, Doug, and John are exceptionally fine teachers and highly esteemed colleagues. I am so grateful for the harmonious spirit and thorough professionalism demonstrated by our faculty and staff." (The copy submitted was from President Reynolds' personal file and included the Prescient's handwritten interlineations, questioning ("?") these statements.) (Dr. Reynolds had also expressed his

support for Dr. Gould and his lack of confidence in Dr. Stone in an interview and in a letter to the Editor of the local newspaper in March of 1993, stating "I tried in the forty-five minutes that I spent with the reporter to place this matter into a larger context covering twenty years or so. I expressed my very satisfying colleagueship and friendship with Professors Gould and Vaughan and stated that Professor Gould had borne the brunt of coming into the Department in 1974 when a rather fractious state existed...and I tried then and have tried since to be encouraging to and supportive of him as my colleague and friend" and "I think she will need to demonstrate that this was an anomalous circumstance and one to which she did not contribute unduly. It appears in most ways she has conducted herself in a professional manner. At the same time I'm not concerned if she should leave." (The President's interview and letter were given and sent against Bishop's advice, the day after Bishop had issued a very general press release in response to a press inquiry, stating that retirement packages had been offered to three professors in the Journalism Department.)

Bishop's tenure as Vice-President was tenuous, for the first time, beginning in 1993, after Stone filed her EEOC complaint. In late March or early April, after the press coverage of the Stone complaint in March, Reynolds held a "cabinet meeting" wherein he disclaimed any knowledge of Dr. Stone's concerns until he was told by the university general counsel in November of 1992. (A copy of a letter confirming President Reynolds' disclaimer was included as an attachment to Bishop's Affidavit submitted in support of his Response to Baylor's Motion for Summary Judgment. Bishop confronted Reynolds with his recollection that he [Bishop] had told Reynolds in the spring of 1992 that there were problems in the journalism department and that "there was the possibility of a lawsuit being filed if Dr. Gould was re-appointed Chair of the Department at

that time." In May of 1993, President Reynolds threatened to remove Bishop as Vice-President. A copy of Reynolds' letter to another administrator confirmed that conversations regarding Bishop's removal occurred at this time. In July of 1994, the Communications and Marketing Subcommittee of Baylor's Board of Regents adopted a recommendation that all marketing and public relations functions of the university should be coordinated and consolidated to report to Bishop, as Vice-President for Communications and Marketing, effective January 1, 1995. President Reynolds did not speak out against the recommendation until after Bishop expressed his opinion about a possible dollar amount of settlement for the Sara Stone case on August 5, 1994. On August 22, 1994, President Reynolds delivered a letter stating his opposition to the proposal to the Chair of the Board's subcommittee and on August 26, 1994, the Chair stated his agreement to "withdraw" the proposal and the proposal was officially "deferred" when Baylor's Regents met in September of 1994. Also, in the Fall of 1994, President Reynolds verbally threatened to terminate Bishop.

The Stone case was settled through formal mediation in late November, 1994 and a copy of the confidential settlement was submitted under seal to the court for review.

President Reynolds had announced his intention to retire from the Presidency in June of 1995. On February 21 or 22, 1995, Baylor's Regents named Dr. Robert Sloan as President-Elect. On March 15, 1995, President Reynolds, for the first time, sent a letter to all Baylor Administrators encouraging them to meet with Dr. Sloan. In mid to late March, the Regents were scheduled to hold their spring meeting which would be the last meeting before the passing of the presidency from Reynolds to Sloan, effective June 1, 1995. On the day prior to the meeting, Bishop learned from a Regent that a proposal was going to be

presented to the Board that would eliminate his position and consolidate his functions under another university administrator, who was the Vice-President of University Relations. A handwritten note on Dr. Reynolds' calendar for March of 1995, indicated that there was to be or was a conference call including President Reynolds, President-Elect Sloan, and the Chair of the Board of Regents on March 21, 1995, three days prior to the Regents' meeting and the topic of the meeting was "Status of Bishop". Sloan admitted in his Affidavit in support of Baylor's Motion that Bishop was proposed to be terminated in March of 1995 at the Regents' meeting. However, one or more of the Regents derailed or merely delayed action on the proposal. Because Sloan was scheduled to make a statewide tour of appearances following his inauguration in June, Bishop was consumed with planning and implementing the press/public relations tour, which actually ended in July, 1995.

On July 14, 1995, President Sloan told Bishop that he was discharged from his position as Vice-President and that the functions of his department would be subsumed under the Vice-President of University Relations, Gwin Morris, who had been named as Vice-President at the Regents meeting in March of 1995. President Sloan told Bishop that he had done an excellent job of the statewide tour, but that he [Bishop} was a victim of 'transitional politics.' No other reason was stated to Bishop's for the discharge. President Sloan also repeated that single reason to Dr. Stone when she requested to meet with him to discuss Bishop's removal.

Standard of Review

Because this Petition for Writ of Certiorari is from the lower courts' decisions granting and affirming of Baylor's Summary Judgment on Bishop's retaliation claim, this court must

review the decision of the circuit court de novo. Summary judgment is proper when no issue of material fact exists and the moving party is entitled to judgement as a matter of law. In determining whether summary judgment was proper, all fact questions are viewed in the light most favorable to the non-movant and all inferences are drawn in favor of the non-movant. *Anderson v. Liberty Lobby*, cited supra.

In addition the court is requested to resolve a conflict in the circuit courts of appeals regarding the scope of the protection afforded to third persons under 42 U.S.C. § 2000e-3, which simply involves the statutory construction of this particular provision of Title VII, since the Fifth Circuit adopted the district court's decision that Bishop had not engaged in activity protected by 42 U.S.C. § 2000e-3.

REASONS FOR GRANTING THE WRIT

I.

There is a Conflict in the Circuits Concerning the Scope of Protection afforded to Third Persons under the Anti-Retaliation Provision of Title VII

Both the district court and the Fifth Circuit panel decided that Bishop's activity in the Stone case did not rise to the level of "protected activity" as that term is meant to be applied by 42 U.S.C. §2000 e-3. The same decision would not necessarily have been reached in other circuits because there is a conflict in the circuits concerning the scope of protection afforded by Title VII's anti-retaliation provision.

In this case, the Fifth Circuit adopted the decision of the district court in this case, stating:

> "As to the district court's decision to grant Baylor's motion for summary judgment on the merits and the resulting order to dismiss Bishop's claims, we affirm for essentially the reasons stated in the district court's order dated April 4, 2000."

The District Court's opinion stated, in relevant part:

> ...there is no indication that any responsible individual at Baylor realized that Plaintiff was acting on Dr. Stone's behalf or as her representative. To the contrary, Plaintiff was requested to attempt to resolve Dr. Stone's complaints as a representative of Baylor. Additionally, there is nothing to establish a causal connection between Plaintiff's actions in the Dr. Stone affair and his removal as Vice President by Dr. Sloan. As is obvious from the summary judgment proof, the majority of the problems and disagreements related to Dr. Stone's complaints occurred prior to Dr. Sloan's appointment as President of the University. There is only Plaintiff's mere speculation that his removal by Dr. Sloan was at the behest of Dr. Reynolds."

Thus, the district court concluded (1) that Bishop's activity in the Stone case was not activity that was "protected" under Title VII's anti-retaliation provision, and (2) that there was no causal relationship between Bishop's activity in the Stone case and his removal by President Sloan in July of 1995.

A. What is Protected Activity under 42 U.S.C. § 2000e-3?

There is a substantial conflict among the Circuit Courts of Appeal regarding the scope of protection afforded to third persons under the Anti-Retaliation provision of Title VII, which in pertinent part provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment...**because he has opposed any practice made an unlawful employment practice by this title** [42 U.S.C. §§ 2000e-2000e-17], or **because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.** (emphasis added)

The two reasons stated in this provision are most commonly referred to as the "opposition" clause and the "participation" clause.

B. Was Bishop Protected by 42 U.S.C. § 2000e-3?

With respect to case law involving interpretation of the "opposition" clause, the cases generally hold that third persons claiming to have "opposed" discriminatory practices (1) must have had a good faith reasonable belief (by an objective standard) that discrimination practices existed and (2) must have been motivated by that belief to protest or correct the alleged discriminatory conditions of employment. *See e.g., Clover v. Total System Services, Inc.*, 176 F.3d 1346, 1351 (11th Cir. 1999) and *Merritt v. Dillard Paper Company*, 120 F.3d 1181 (11th Cir. 1997). Courts also generally acknowledge that the scope of protection under the "opposition" clause is more limited that the protection afforded by the "participation clause, and that vague references

to "unfair treatment" may not suffice as "opposition" to discriminatory practices invoking protection under 42 U.S.C. § 2000e-3. *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1312 (6th Cir. 1989).

Bishop's advice to Reynolds in 1992 admittedly did not specifically refer to "discrimination" or to "gender bias" or to any specific type of unlawful activity. However, when Bishop stated that the reappointment of Gould as Chair might precipitate a "lawsuit," Bishop's statement should have put President Reynolds on notice that some faculty in Journalism had a complaint of unlawful activity. Also, it is not clear that Bishop's "motive" at the time was to protest discrimination against Stone as much as it was to avoid problems in the department and for the university. If this were the only action taken by Bishop in the course of the Stone case, Bishop would arguably not be protected by the anti-retaliation provision of Title VII. However, Bishop's action did not stop here.

After Gould was reappointed Chair of Journalism, Stone filed a discrimination complaint under the university's policies and procedures. At that point, the scope of protection afforded to Bishop under the "participation" clause of 42 U.S.C. § 2000e-3 becomes the issue, because Bishop was "participating" in an ongoing proceeding--beginning with an internal proceeding and followed by the filing of an EEOC charge and a lawsuit.

After Stone advanced to the internal complaint procedure prescribed under the university's policies, Bishop could be characterized sequentially as (1) a faculty colleague, and (2) a supervisor (after he was appointed Acting Chair in December of 1992), and (3) as a spokesman to the press (after the investigation became known to the media in March of 1993), and (4) a mediator (after he was requested to perform that function

in March of 1994) and (5) a potential witness in a lawsuit (because of his knowledge in 1992 and his advice to the President related to that knowledge and because of all the other roles he played that were relevant to the Stone complaint.) Was Bishop protected by the participation clause in all of these capacities? Further, does the fact that he was always acting as a representative of the university prevent him from invoking the protection of the Title VII anti-retaliation provision when his actions are inconsistent with what the President believes is the best interest of the university? The law is unclear and conflicting in these regards.

The Eleventh Circuit and the Ninth Circuit have held that the "participation" clause does not apply until and unless an EEOC complaint has been filed. *Equal Employment Opportunity Commission v. Total System Services, Inc.*, 221 F.3d 1171, 1174 (11th Cir. 2000), *rehearing en banc denied per curiam with dissent*, at 240 F.3d 899 (2001); *Vasconcelos v. Meese*, 907 F.2d 111 (9th Cir. 1990). See, however, also *Clover v. Total System Services, Inc.*, 176 F.3d 1346, 1352 (11th Cir. 1999), wherein the court noted that Clover participated in an internal investigation that was done in response to notice of an EEOC complaint, thus Clover would be protected by the "participation" clause. See, also *Merritt v. Dillard Paper Company*, 120 F.3d 1181, 1183 (11th Cir. 1997), wherein Merritt participated in a deposition that was taken after the EEOC had issued a right to sue and a lawsuit had been filed.

The Fifth and Eighth Circuits have not restricted their holdings to situations involving a formal EEOC complaint; however, both courts have suggested by the language of their opinions that the third person must "assist" the affected employee in order to claim the protection of the participation clause. *Holt v. JTM Industries, Inc.*, 89 F.3d 1224 (5th Cir. 1996),

cert. denied, 520 U.S. 1229, 117 S.Ct. 1821, 1227 (1997); *Smith v. Riceland Foods, Inc.*, 151 F.3d 813, 818 (8th Cir. 1998). See also *Equal Employment Opportunity Commission v. Ohio Edison Co.*, 7 F.3d 541, 542 (6th Cir. 1993), wherein the Court ruled that an employee was protected from retaliation when the third person acted as his **representative** in voicing complaints about discrimination.

Finally, the Seventh Circuit has very broadly held that a third person will be protected from retaliation even though the person has not "participated" as a complainant or as an advocate or supporter of the complainant in any Title VII proceeding. *See McDonnell v. Cisneros*, 84 F.3d 256, 258 (7th Cir. 1996), wherein a supervisor [Mr. Brockmeier] was retaliated against for not controlling his subordinate [McDonnell], i.e. getting his subordinate to drop her Title VII complaint. (Interestingly, both Brockmeier and McDonnell had been the Respondents in anonymous charges alleging sexual misconduct in the workplace. The court noted that "generally one retaliates against someone because of something he did rather than because of something someone else did. Not always. There is such a thing as collective punishment.")

Bishop is entitled to the protection under the anti-retaliation provision of Title VII because he participated in many different capacities in the Stone matter. It does not matter whether he was participating as an administrator, i.e. as a representative of the university, or whether he was secretly a "Stone" supporter--he was a participant. The side that Bishop was on should not be controlling. See *Merritt v. Dillard Paper Company*, 120 F.3d 1181 (11th Cir. 1997), wherein the Plaintiff was an involuntary witness whose testimony helped the Plaintiff rather than the employer. Most of Bishop's participation occurred after Stone filed her complaint under the university's

policies and continued through the EEOC filing and into the lawsuit phase. His actions were clearly in conflict with the wishes of the President, e.g. Bishop recommended that Gould be removed from the faculty by resignation or retirement, but Reynolds chose to retain Gould on the Journalism faculty and appoint him to be Head of a university Institute; Bishop tauted Stone's professionalism and contributions to the department in spite of her ongoing legal action, but Reynolds questioned her actions and "wasn't concerned if she left"; Bishop believed that Stone's complaint had merit and that she should be compensated, but Reynolds expected Bishop to be able to resolve Stone's case with little damage to the university and its pocketbook.

Alternatively, Bishop should have the same protection afforded to the Plaintiff in the Seventh Circuit case, cited supra, because the evidence in this case tends to show that Bishop fell in disfavor both because of what he did and what he did not do in the course of proceedings relating to the Stone case. He could not settle the Stone case in accordance with the wishes of the university President, i.e. he could not get Stone to drop her complaint even after the university had made drastic changes in the faculty in the Journalism Department--primarily because Dr. Gould, who was the original perpetrator, was still favored by the Baylor administration.

The district court and the Fifth Circuit both erred in failing to hold that Bishop engaged in activity protected by 42 U.S.C. § 2000e-3.

II.

This Case Raises an Important Recurring Question of Federal Law that is Unresolved and that Should be Resolved by this Court

The scope of the protection afforded by the Anti-Retaliation Provision of Title VII affects every employment case that includes a retaliation claim, because the first element to be proved is whether or not the plaintiff engaged in protected activity. In an area of law that increasingly consumes the dockets of federal courts and provides guidance for various state court, conflicts and disparities in the scope of protection, as defined by the various Circuit Courts of Appeal, is of grave importance to the workforce nationwide and the standards to be applied should be clearly defined and equally applicable in all circuits.

Because this case is also of grave importance to Dr. Bishop, Bishop respectfully requests this court to review the lower court's rulings in all respects and therefore presents the following argument with respect to whether or not the summary judgment sought by Baylor should have been denied.

Assuming that Bishop engaged in "protected activity under 42 U.S.C. § 2000e-3", and, given a de novo review under the standards required by *Anderson v. Liberty Lobby,* cited supra, the summary judgment record in this case is sufficient to raise a material fact issue as to whether or not there was a causal relationship between Bishop's protected activity and the adverse employment action suffered by Bishop, i.e. Baylor's termination of Bishop's employment as Baylor's Vice-President of Communications and Marketing.

The summary judgment evidence introduced by Bishop, particularly his Affidavit(s) and the documents attached thereto, many of which were produced by Baylor and the Affidavit of Sara Stone, include the following facts:

1. In July of 1991, Baylor's newly appointed Vice-President for Academic Affairs, Dr. Donald Schmeltekopf, received a letter from Dr. Sara Stone, who was a tenured Associate Professor in Journalism, complaining about her problem in the Journalism Department, stating:

"There is evidence of sexual discrimination within my department, which I have discussed very recently with Dr. Hillis [Vice-President of Student Relations] and on three occasions dating back at least 18 months with Dr. Cooper [Dean of College of Arts and Sciences]. I have been the subject of that discrimination. I made it clear to both Dr. Hillis and to Dr. Cooper that I have no beef with the university. My beef is with my department chairman, Loyal Gould.

...

"However, I am finding it consistently more difficult to deal with Dr. Gould. He called a departmental faculty meeting (with not all faculty members invited) during the spring semester final exam week--I was the subject of that meeting. Dr. Cooper and Dr. Hillis are both familiar with the details of that meeting.

"In discussing that experience with my brother, an assistant United States Attorney, he advised me that Loyal's conduct was 'egregious' and that I should not meet with him again without having legal counsel present. I found that advice extreme, but suffice to say

that I am not happy with the status quo in my department."

2. In June of 1991, Dr. Loyal Gould had sent a letter to President Herbert H. Reynolds, advising Reynolds that he was having a problem in the Journalism Department and that he had been told that Dr. Sara [Stone] was threatening to file a lawsuit against him.

3. In the spring of 1992, before President Reynolds re-appointed Dr. Gould as Chair of Journalism, Bishop told Reynolds that there were problems in the Journalism Department relating to Gould's administration and that "there was a possibility of a lawsuit if Gould was re-appointed."

4. Reynolds reappointed Gould as Chair in late spring or early summer of 1992.

5. Stone filed a complaint against Gould with Baylor's Sexual Harassment Mediation Board in the late summer or early fall of 1992, alleging a sexually hostile work environment in her department. The complaint was resolved by agreement using the process prescribed by Baylor's personnel policies. In November of 1992, Stone reported to the Board that Gould had breached the agreement and Stone also began the process of filing with EEOC.

6. In December of 1992, Gould resigned as Chair of the Journalism Department. Reynolds appointed Bishop as Acting Chair of Journalism.

7. In January of 1993, Stone and her counsel cooperated with the university and Stone gave a deposition and produced documents supporting her complaints.

8. In February or March of 1993, Bishop recommended to President Reynolds that four male faculty members of the Journalism Department be removed, either by resignation, retirement, or termination, including Dr. Gould.

9. Shortly after Bishop was appointed Acting Chair of Journalism, he became aware that the local newspaper had obtained information about the investigation involving the Journalism Department. Bishop, with Reynolds knowledge, made an agreement with the newspaper that the newspaper would delay the story while Baylor attempted to resolve the matter, but that the newspaper would understandably release the story if it learned that any competing media was threatening to release the story.

10. In March of 1993, the newspaper contacted Bishop as a courtesy to tell him that competing media were aware of the story and the newspaper was going to release the story. The matter was not yet resolved; however, Bishop prepared a generic press release in an effort to avoid negative consequences to ongoing negotiations with the four faculty members. The article ran on March 16, 1993.

11. Against the advice of Bishop, Reynolds gave an interview to the reporter and another article appeared on March 17th. Again, against the advice of Bishop, Reynolds wrote a letter to the Editor clarifying his statements in

the interview. Reynolds intended to preserve the reputations of the affected professors--particularly Dr. Gould, but the additional press coverage was not beneficial to them or to the university and was detrimental to Stone.

12. In late March or early April of 1993, Reynolds held a "cabinet meeting" wherein he disclaimed any knowledge of the Stone complaint prior to November of 1992, when it was brought to his attention by the university counsel. Bishop disputed Reynolds' disclaimer and told Reynolds that he distinctly recalled telling Reynolds in the spring of 1992 that there were problems in Journalism and that there was a possibility of a lawsuit being filed if Dr. Gould was reappointed Chair. (In his affidavit, Reynolds denied that Bishop told him about Stone's "discrimination complaint" in the spring of 1992, but he did not deny that Bishop advised him that the "re-appointment of Gould could lead to a lawsuit.")

13. Shortly after Bishop confronted Reynolds with his recollection of their conference in the spring of 1992 regarding Gould's reappointment as Chair, Reynolds, for the first time, threatened (verbally) to remove Bishop from his Vice-President position. A copy of a letter drafted by Reynolds in May of 1993, but not sent to Bishop, confirms this threat, stating:

"Effective, July 1, 1993, I am moving the Office of Communications and Marketing under the Division of University Relations. Simultaneously, you are requested to assume your tenured professorship in the Department of Journalism and to serve as Acting Chair of the

Department until I can formulate a plan for the future of the Department.

. . .

You are requested to proceed with ...plans for the future of the Journalism Department. The present faculty, including Professor Loyal Gould, should be included in Departmental deliberations..."

No reason was given for Reynolds' decision, and, as stated above, the decision was not implemented at that time.

14. Stone filed her lawsuit in 1994. In March of 1994, the university, including Reynolds, requested that Bishop attempt to mediate a resolution of Stone's complaint.

Based on Bishop recommendation to remove the four male faculty, Reynolds knew that Bishop believed that Stone's complaint had merit. Reynolds also knew that Bishop had high regard for Stone, based on statements made about Stone in a letter Bishop drafted to Journalism alumni in December of 1993, a copy of which was produced from Reynolds file. Reynolds' copy included interlineations of "?" beside favorable comments regarding Stone.

15. Bishop met with Stone on two occasions to discuss her claim and settlement of her claim. His meetings were documented by Memos to Reynolds. Both documents indicated that he thought settlement would be expensive and that he needed to know the monetary limits of his authority to make offers and that he recommended that a professional mediator be retained for negotiations.

16. On August 5, 1994, having received no guidance for further settlement efforts, Bishop recommended a rather substantial payment to Stone and requested feedback regarding such an offer. Reynolds responded emphatically "NO" and Bishop was not asked to be involved in further negotiations. (Reynolds admitted in his affidavit that he considered Bishop's proposal to be "quite unrealistic" and that he called Bishop and told him that his proposal was unacceptable and that he should not discuss it with Stone and that Bishop had no further role in resolving Stone's claims against Baylor."

17. In July of 1994, without opposition from Reynolds, a subcommittee of Baylor's Board of Regents had recommended that all of the university's public relations and marketing functions be consolidated under Bishop's office, effective January 1, 1995. On August 22, 1994, Reynolds voiced his opposition to the subcommittee's recommendation and requested that the Chair of the subcommittee withdraw the recommendation. Action on the recommendation was officially "deferred" by the Board in September, 1994.

18. At the end of November or in early December of 1994, Baylor negotiated a settlement with Stone, the amount of which is confidential but appears of record under seal.

19. Baylor selected Dr. Robert Sloan as President-Elect on or about February 21 or 22, 1995, to be effective June 1, 1995.

20. In March of 1995, at a Baylor Regents meeting, a proposal to remove Bishop was considered by the Regents in closed session. The proposal included naming

a new Vice-President of University Relations and consolidating the functions of Bishop's office under University Relations--the same arrangement stated by Reynolds in his May, 1993, unsent letter to Bishop removing Bishop as Vice-President. In open session, at the end of day, the Regents announced the appointment of a new Vice-President of University Relations but did not announce any changes in Bishop's position or in the organization, i.e. consolidation of functions.

In his Affidavit, Reynolds admitted that he discussed his "thought about moving Dr. Bishop's area of responsibility to University Relations" but he disclaimed making such a "recommendation" to Dr. Sloan. He also disclaimed recommending the change to the Board. Dr. Reynolds also disclaimed making any "disqualifying" comments about Dr. Bishop. Dr. Sloan admitted that Bishop was proposed to be removed from his position at the March meeting of the Regents, claiming that it was solely his idea, after he began talking to Clif Williams, his adviser, beginning in "March of 1995". Sloan further stated that a Regent urged him to give Dr. Bishop "another" chance, "thus, the reorganization was not announced at that time as contemplated"--indicating that it was approved but not implemented. Neither Sloan nor Reynolds explained the fact that Reynolds' desk calendar indicated that a conference call was to be held or was held between Sloan, Reynolds, and Galloway, the Chair of Baylor's Board of Regents on March 21, 1995, three days prior to the Board meeting, and the calendar reflected that the subject matter of the call was "Re: status of Bishop & Feather". ("Feather" was the Vice-President of University Relations prior to the Regents appointing his

replacement, i.e. Gwin Morris, at its March, 1995, meeting.)

21. From April through June and into July, Bishop worked on matters relating to the inauguration of the new President and a statewide media tour that was to occur in June and July.

22. On July 14, 1995, new President Sloan told Bishop that he was being removed as Vice-President and the functions of his prior office would be consolidated under the new Vice-President of University Relations, thereby implementing Bishop's removal in the manner originally documented by Reynolds' May, 1993 unsent letter. When Bishop asked for a reason, President Sloan merely stated that he was a "victim of transitional politics."

23. After a relatively short period of time, President Sloan appointed a new Vice-President of Communications and Marketing and re-divided the responsibilities of the offices of Communications and Marketing versus University Relations.

Because President Sloan claimed all the credit for orchestrating the removal of Bishop from his position as Vice-President, the reasons for the removal stated by Baylor were: (1) Sloan had heard many negative comments about Bishop at a Dean's meeting he attended once when he was Dean of the Seminary in 1993-1995, (2) he was dissatisfied with Bishop's services during the opening of the Seminary in the fall of 1994, because Bishop did not handle this event himself but instead assigned the responsibility to one of his staff, and (3) although the statewide "media blitz" was acceptable, he thought Bishop was planting rumors with the press during the tour. Sloan did not support his

reasons with any specific facts, nor did he identify any person who expressed dissatisfaction with Bishop's work, nor did Baylor produce any documents reflecting complaints by Sloan about Bishop's services, although Bishop's file relating to the opening of the Seminary remained in the exclusive control of Baylor. Nonetheless, Bishop refuted each of Sloan's undocumented "reasons" with factual statements, to the extent possible, and documents, where appropriate.

Bishop is not required to prove his case by direct evidence nor does one expect an employer to admit that retaliation occurred. Instead, most such cases are established by circumstantial evidence and in such cases, temporal contiguity is often considered as sufficient circumstantial evidence to withstand summary judgment. See, e.g. *Reich v. Hoy Shoe Co., Inc.*, 32 F.3d 361, 365 n.4 (8th Cir. 1994); *Smith v. St. Louis Univ.*, 109 F.3d 1261, 165-66 (8th Cir. 1997). In this case, the first threat of Bishop's removal came within a month of Bishop's confrontation with Reynolds wherein Bishop reminded Reynolds that he had told him that Gould's reappointment as Chair might precipitate a lawsuit against the university. The first threat also followed the negative publicity that Reynolds brought about himself by his interview and letter to the editor of the local newspaper. The second threat came in the fall after Bishop disclosed his one and only settlement offer that he suggested might be made to Stone. Reynolds testified that the amount proposed by Bishop was "quite unrealistic" and that he called and instructed Bishop not to talk about it with Stone. Within a couple of weeks, Reynolds dissuaded the Regents from implementing a recommendation that had already been made to consolidate the functions of university relations under Bishop's office. By "deferring" action on the recommendation favorable to Bishop, Reynolds clearly preserved his option to remove Bishop and consolidate Bishop's functions under University

Relations. Finally, Reynolds' 1993 plan was taken to the Board of Regents in March, 1995, at its first meeting following the settlement with Stone that the university reached in November or December of 1994, which was a substantial settlement. According to Sloan, the plan to remove Bishop was approved in March, but was not implemented until Bishop had completed the statewide media blitz in July of 1995.

If all the facts favorable to Bishop are assumed to be true, and if all inferences from the facts are drawn in Bishop's favor, a reasonable factfinder could arrive at a verdict in Bishop's favor and Baylor's Motion for Summary Judgment on Bishop's retaliation was improvidently granted.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Dated: June 11, 2001.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-50529
Summary Calendar
D.C. Docket No. W-98-CV-131

MICHAEL E BISHOP, Dr
Plaintiff - Appellant

v.

BAYLOR UNIVERSITY, c/o Robert B Sloan, Jr
Defendant - Appellee

Appeal from the United States District Court for the Western District of Texas, Waco

Before DAVIS, JONES, and DeMOSS, Circuit Judges.

J U D G M E N T

This cause was considered on the record on appeal and the briefs on file.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendant - appellee the costs on appeal to be taxed by the Clerk of this Court

ISSUED AS MANDATE: APR 4 2001.

Clerk, U.S. Court of
Appeals, Fifth Circuit

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 00-50529
Summary Calendar

MICHAEL E. BISHOP, Dr.,

Plaintiff-Appellant,

VERSUS

BAYLOR UNIVERSITY,

Defendant-Appellee.

Appeal from the United States District Court for the Western District of Texas, Waco Division (W-98-CV-131)

Before DAVIS, JONES and DeMOSS, Circuit Judges.

PER CURIAM:[1]

---

[1] Pursuant to 5th Cir. R. 47.5, the Court has determined this opinion should not be published and is not precedent except under limited circumstances set forth in 5th Cir.R.47.5.4.

Plaintiff Dr. Michael E. Bishop ("Bishop") appeals the dismissal on summary judgment of his employment discrimination claims against Baylor University. He also challenges certainorders issued by the district court denying requests for extension or modification of discovery deadlines.

As to the district court's decision to grant Baylor's motion for summary judgment on the merits and the resulting order to dismiss Bishop's claims, we affirm for essentially the reasons stated in the district court's order dated April 4, 2000.

As to the district court's denial of Plaintiff's requests for extensions of discovery deadlines and for new or modified scheduling orders, we start with the premise that a district court's denial of a continuance for additional discovery is reviewed to determine whether it represents an abuse of discretion and will not be overturned unless it is arbitrary or clearly unreasonable. Transamerica Ins. Co. v. Avenell, 66 F.3d 715, 721 (5th Cir. 1995). As it appears that plaintiff's motions for additional time for discovery were made for the purpose of obtaining evidence with which to oppose defendant's motion for summary judgment, we will evaluate it as a motion under Rule 56(f). To obtain a continuance in accordance with this rule, a party must explain (1) why it is currently unable to present evidence creating a genuine issue of material fact, and (2) how a continuance would enable the presentation of such evidence. Liquid Drill, Inc. v. U.S. Turnkey Exploration, Inc., 48 F.3d 927, 930 (5th Cir. 1995). With regard to the first element, Bishop's motions cite primarily his counsel's substantial work obligations in other cases. While we are

sympathetic to counsel's plight as a solo practitioner, we note that this case had been pending for eight months prior to a joint request for extension of the discovery deadlines (which the district court granted) and for four additional months before Bishop requested the first of the extensions at issue on appeal. During the four month extension period, Bishop noticed no depositions of the witnesses whose testimony is now deemed critical to this case. Under these circumstances, we cannot say that the district court abused its discretion in denying further extensions of the discovery deadline.

Accordingly, the judgment of the district court is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

WACO DIVISION

DR. MICHAEL E. BISHOP,	§	
Plaintiff,	§	
	§	
v.	§	**CIVIL ACTION**
	§	**NO. W-98-CA-131**
	§	
BAYLOR UNIVERSITY,	§	
Defendant.	§	

ORDER

Plaintiff brings this action under the provisions of Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended, 42 U.S.C. § 2000e, et seq. and the Age Discrimination in Employment Act of 1967 ("ADEA"), as amended, 29 U.S.C. §§ 621-634. He asserts that he was terminated because of his age and in retaliation for opposing gender and religion-based discrimination. Defendant has filed its second motion for summary judgment. In response to Defendant's motion, Plaintiff concedes that there is insufficient evidence to support his claim that he was demoted because of his age. Therefore, Defendant's second motion for summary judgment will be granted as to Defendant's age discrimination claim.

Having reviewed the remainder of Defendant's motion, Plaintiff's response, and the summary judgment

proof presented, the Court has determined summary judgment should be granted as to Plaintiff's other claims.

I. Background

Plaintiff was hired for the position of Chief of Staff for Baylor University by President Reynolds in March 1991. Deposition of Plaintiff Dr. Michael E. Bishop ("Bishop Dep."), Vol. II, p. 191. Shortly thereafter, Plaintiff was made a Vice President of the University in charge of the Office of Communications and Marketing. Bishop Dep., Vol. II, p. 198-199. In 1992, Plaintiff was informed that there were problems in the Journalism Department. Bishop Dep., Vol. I, P. 150. Dr. Sara Stone complained that she was being unfairly treated in an effort to force her out of the Journalism program. Bishop Dep., Vol. I, pp. 151-153. In the early spring of 1992, Plaintiff approached Dr. Reynolds to inform him that the Journalism faculty was divided over the administrative practices and policies of its current Chair, Dr. Loyal Gould. Bishop Dep., Vol. I, P. 166. Plaintiff did not identify the individuals reporting their concerns or even mention that the problems were gender related because Plaintiff had been approached by Drs. Stone and Ferdon on a confidential basis. Bishop Dep., Vol. I, pp. 164-65. The next conversation Plaintiff had with Dr. Reynolds regarding this matter was in December 1992 when Dr. Reynolds telephoned Plaintiff to inform him that Dr. Gould had resigned and that Dr. Reynolds was appointing Plaintiff as the acting Chair of the Journalism Department. Bishop Dep., Vol. I, pp. 173-74.

Despite Dr. Gould's resignation, problems continued to plague the Journalism Department. In the spring of 1994, Plaintiff recommended that faculty changes could

resolve the problems, specifically seeking the retirement of Baylor's four senior journalism professors. Bishop Dep., Vol. I, p. 187. During this same period, Plaintiff agreed to meet with Dr. Stone as the Baylor administration representative in an effort to resolve Dr. Stone's complaints. Bishop Dep., Vol. I, p. 187, 195 and Vol. II, pp. 30-32. Plaintiff met with Dr. Stone as Baylor's representative on March 6, 1994, at which time Dr. Stone first detailed her complaints. Bishop Dep., Vol I, pp. 187-88, 190, 195, and Ex. 8. Plaintiff had a number of discussions with Dr. Stone in an effort to reach a formal settlement proposal. Bishop Dep. at Ex. 8. Throughout the settlement negotiations, Plaintiff offered Baylor advice regarding settlement strategy and suggested possible settlement offers. Reynolds Aff. And Ex. J. Plaintiff's final involvement in the Stone matter was to send Dr. Reynolds a memo discussing settlement prospects. Plaintiff Dep., Vol I, p. 216 and Ex. 10. Throughout the process, Dr. Reynolds assumed Plaintiff was attempting to fulfill his responsibilities as a member of his cabinet and that Plaintiff had been and intended to continue to advocate Baylor's position and interests with regard to Dr. Stone's complaints. Reynolds Aff. Plaintiff sent a letter to Dr. Reynolds in which he stated that he wanted his involvement in Dr. Stone's complaint to be "in whatever manner is most beneficial to the University." Reynolds Aff. and Ex. J.

In February 1995, Dr. Robert Sloan was selected to succeed Dr. Reynolds as president of Baylor. Reynolds Aff. February through May of 1995 was a transition period between the two administrations, during which time Dr. Sloan conferred with Reynolds about the existing staff. Reynolds Aff.; Affidavit of Dr. Robert Sloan ("Sloan Aff."). Dr. Sloan's initial experience with Plaintiff occurred when

Dr. Sloan became the Dean of Baylor University's George W. Truett Theological Seminary in 1993. Sloan Aff. In the summer of 1995, Dr. Sloan advised Plaintiff that he intended to remove Plaintiff from his position and gave him several alternatives. Plaintiff ceased to serve as a vice president effective August 31, 1995, and became Chair of the Journalism Department. A number of other vice presidents were replaced, either at Dr. Sloan's insistence or through voluntary resignation. The only vice president that remained from Dr. Reynolds' administration was Dr. Donald Schmeltekopf. Subsequently, Plaintiff was quoted in a number of periodicals regarding his dissatisfaction with Dr. Sloan and Baylor. Because of this unfavorable publicity, Plaintiff was removed from his position as Chair of the Journalism Department. Plaintiff further asserts that he was not appointed to the Fred Hartman Chair of Journalism because of his activities.

II. Summary Judgment

Summary judgment should be granted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A disputed material fact is genuine if the evidence is such that a jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986). The initial burden to demonstrate the absence of a genuine issue concerning any material fact is on the moving party. Celotex v. Catrett, 477 U.S. 317, 325 (1986). This burden can be satisfied by pointing out to the district court that there is an absence of evidence to support an essential element of the non-moving

party's case. Id. Upon such a showing, the burden shifts to the non-moving party to establish that there is a genuine issue. Id. at 324. "[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Id. at 322.

III. Discussion

A. Exhaustion of Administrative Remedies. The filing of an administrative complaint is a jurisdictional prerequisite to an action under Title VII. Dollis v. Rubin, 77 F.3d 777, 781 (5th Cir. 1995). Allegations that are not in an administrative charge generally cannot be raised in a subsequent complaint filed in the district court. Id. Defendant argues that Plaintiff has failed to exhaust the following claims: (1) that he was retaliated against for opposing religion-based discrimination; (2) that he was denied the Hartman Chair in retaliation for his opposition to sexual and religious discrimination; and (3) that he was removed from his position as Chair of the Journalism Department in retaliation for his opposition to sexual and religious discrimination. Plaintiff's response to Defendant's motion for summary judgment addresses only Plaintiff's claim that he was removed from his position as Chair of the Journalism Department; he presents nothing to establish that he presented his other claims to the EEOC for investigation. Accordingly, summary judgment is appropriate as to Plaintiff's claims that he was improperly denied the Hartman Chair and that he was retaliated

against for opposing religious discrimination.[2]

Summary judgment is additionally appropriate for Plaintiff's claim related to his removal as Department Chair. Although Plaintiff attempted to amend his complaint with the EEOC to add this claim, this was never received by the EEOC. The summary judgment proof establishes that the last communication in regard to this claim was a letter from the EEOC dated October 28, 1997 that warned Plaintiff's counsel, "if you wish to further amend this charge to include Dr. Bishop's removal as Chairman of the Journalism Department, please send documentation immediately." Deposition of LaNelle McNamara ("McNamara") at Ex. 14. However, no further action was taken to present this claim to the EEOC. McNamara Dep. at 120-24. Although, as Plaintiff notes, an EEOC charge and investigation should encompass claims that are reasonably related to the original charge, there is nothing to indicate that the EEOC has a duty to investigate a claim that is specifically not pursued, as in the present case. Therefore, summary judgment is appropriate as to Plaintiff's claim regarding his removal as Department Chair.

---

[2] Even assuming that Plaintiff exhausted his religion-based claims, he has failed to establish a prima facie case of retaliation because the summary judgment proof presented to the Court establishes that Baylor University is an exempt religious educational institution.

B. Retaliation. The only claim that remains for resolution is whether Plaintiff was removed from his position as Vice President in retaliation for opposing sexual discrimination. In a retaliation case, the Title VII plaintiff establishes a prima facie case by showing: (1) that he was engaged in an activity protected by Title VII; (2) that he was subjected to an adverse employment action; and (3) that there was a causal connection between his participation in the protected activity and the adverse employment action. Dollis v. Rubin, 77 F.3d at 781; Shirley v. Chrysler First, Inc., 970 F.2d 39, 42 (5th Cir. 1992). Plaintiff's case fails on two grounds; (1) he was not engaged in a protected activity; and (2) even if the activity was protected, there is no causal connection between the activity and the adverse employment action.

As previously noted, Plaintiff asserts that he was removed from his position as Vice President in retaliation for having supported Dr. Stone in her sexual discrimination claims against the University and Dr. Gould.[3] However, there is no indication that any responsible individual at Baylor realized that Plaintiff was acting on Dr. Stone's behalf or as her representative. To the contrary, Plaintiff was requested to attempt to resolve Dr. Stone's complaints as a representative of Baylor. Additionally, there is nothing

---

[3] Plaintiff also claimed that he was retaliated against for protesting the failure to hire Margaret Thomas for a position as professor in the Journalism Department. However, Plaintiff did not respond to Plaintiff's summary judgment proof in this regard. Summary judgment is, therefore, appropriate.

to establish a causal connection between Plaintiff's actions in the Dr. Stone affair and his removal as Vice President by Dr. Sloan. As is obvious from the summary judgment proof, the majority of the problems and disagreements related to Dr. Stone's complaints occurred prior to Dr. Sloan's appointment as President of the University. There is only Plaintiff's mere speculation that his removal by Dr. Sloan was at the behest of Dr. Reynolds. In light of the foregoing, it is

ORDERED that Defendant's Motion for Summary Judgment is **GRANTED**.

It is further **ORDERED** that Plaintiff's Motion to File Executed Affidavit of Michael E. Bishop in Support of Plaintiff's Response to Defendant's Second Motion for Summary Judgment is **GRANTED** as the Court has considered this affidavit in resolving the summary judgment issues. It is further **ORDERED** that Defendant's Motion to Strike and Motion for Leave to File Defendant's Reply to Plaintiffs Response to Defendant's Motion to Strike are **DENIED**. It is further **ORDERED** that any motions not previously ruled upon by the Court are **DENIED**.

SIGNED this 4 day of April, 2000.

/s/
WALTER S. SMITH, JR.
United States District Judge

Supreme Court, U.S.
FILED
JUL 18 2001
CLERK

No. 00-1886

In The

Supreme Court of the United States

MICHAEL E. BISHOP, DR.,

Petitioner,

v.

BAYLOR UNIVERSITY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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QUESTION PRESENTED

Whether an officer of Baylor University who represented Baylor University during informal settlement negotiations of an employee's sex discrimination complaint engaged in protected activity under Title VII for opposing sex discrimination?

DISCLOSURE PURSUANT TO RULE 29.6

The Petition for Writ of Certiorari accurately lists the parties to the proceeding.

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STATEMENT OF THE CASE

On April 10, 1998, Michael Bishop ("Petitioner") filed his Original Complaint in which he presented numerous claims regarding age discrimination, retaliation for opposing religious discrimination, and retaliation for opposing sex discrimination. On August 12, 1998, Baylor University ("Baylor") filed its Original Answer and First Motion for Summary Judgment, which sought dismissal of Petitioner's lawsuit based on his failure to file within 90 days of receiving the EEOC's dismissal notice. The District Court denied Defendant's Motion for Summary Judgment on the grounds that the 90-day limitation period should be tolled.

On April 9, 1999, Baylor filed its Second Motion for Summary Judgment on all of Petitioner's claims. With regard to Petitioner's retaliation claims for opposing sex discrimination, Baylor moved for summary judgment on three separate grounds: (i) Petitioner's failure to show he had opposed sex discrimination as pleaded in Petitioner's Original Complaint; (ii) Petitioner's failure to establish a causal connection between alleged protected activity and an adverse employment action; and (iii) Petitioner's failure to show Baylor's legitimate, non-retaliatory reasons for his removal as Vice President were pretext for unlawful retaliation.

On April 4, 2000, the District Court granted summary judgment on all claims. With regard to retaliation for opposing sex discrimination, the District Court granted summary judgment on two separate grounds: (i) Petitioner's failure to establish he had opposed sex discrimination; and (ii) Petitioner's failure to establish a causal

connection between any alleged protected activity and an adverse employment action. Because Petitioner could not establish a *prima facie* case, the District Court did not consider whether Petitioner had sufficient evidence to establish Baylor's legitimate reasons for removal were pretext for unlawful retaliation.

On appeal to the Fifth Circuit, Petitioner sought reversal of the entire summary judgment order. In support of the judgment, Baylor asserted the matters raised in both the first and second motions for summary judgment. On March 13, 2001, the Fifth Circuit affirmed the entire judgment, adopting the trial court's reasoning.

On June 11, 2001, Petitioner filed a Petition for Writ of Certiorari, which concedes summary judgment on all claims, except retaliation for opposing sex discrimination with regard to Petitioner's removal as Vice President. However, Petitioner focuses only on one of the two grounds upon which summary judgment was granted and affirmed. Specifically, Petitioner's "Questions Presented" seeks review regarding whether Petitioner engaged in protected activity, and does not dispute that the correct legal standards were applied when determining Petitioner failed to establish a causal connection between Petitioner's removal as Vice President and alleged protected activity. Instead, Petitioner invites this Court to review the voluminous summary judgment record in the hope that this Court will disagree with the District Court's and the Fifth Circuit's determination that Petitioner failed to present sufficient evidence to establish a causal connection, and thus failed to establish a *prima facie* case of retaliation.

STATEMENT OF MATERIAL FACTS

Petitioner's "Statement of Material Facts" almost exclusively concerns his relationship with Herbert Reynolds, former Baylor University President, and contains almost no discussion of Petitioner's relationship with Robert Sloan, current Baylor University President. Yet, President Sloan, not President Reynolds, made the decision to remove Petitioner as Vice President. Plaintiff simply ignores this undisputed fact and speculates that President Reynolds somehow orchestrated Petitioner's removal as Vice President.

Below are the actual material facts without the speculation and hyperbole that permeate Petitioner's pleading:

Removal as Vice President

I. In March 1990, the President of Baylor University, Herbert Reynolds, hired Petitioner for the position of Chief of Staff for Baylor University. (5 R, Pl. Dep. at V. II, p. 191, lines 10-20 & Exh. 42)[1] Shortly after being hired as Chief of Staff, Petitioner was made a Vice President of

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[1] "R" refers to the record on appeal. Citations to the record are to the volume of the record on appeal followed by the page number in that volume (thus, 2 R 400 refers to Volume 2, Page 400 of the record). Volume 5 of the record refers solely to Baylor's Second Motion for Summary Judgment, which was not individually numbered. Accordingly, cites to 5 R do not list a page number, but are followed by a page or evidentiary cite to the Motion or the attached summary judgment evidence.

Baylor University ultimately in charge of the Office of Communications and Marketing. (5 R, Pl. Dep. at V. II, p. 198, line 13 to p. 199, line 8)

2. In February 1995, the Board of Regents selected Dr. Robert Sloan to succeed President Reynolds as Baylor's next President. (5 R, Reynolds Aff. at ¶ 19) During the transition period, Dr. Sloan requested that President Reynolds review all members of his staff with him. (5 R, Reynolds Aff. at ¶ 19; *see also* 5 R, Sloan Aff. at ¶¶ 8-9) Although President Reynolds shared his general thoughts about Petitioner and others, he made no disqualifying comments about any individual. (*Id.*) President Reynolds did mention to Dr. Sloan that he had previously considered moving Petitioner's area of responsibility under University Relations, but President Reynolds did not recommend that Dr. Sloan make that change. (5 R, Reynolds Aff. at ¶ 19)

3. President Reynolds did not recommend to President Sloan that anyone be terminated. (5 R, Reynolds Aff. at ¶ 20) President Sloan made no agreement with President Reynolds to remove or replace Petitioner. (5 R, Sloan Aff. at ¶ 9; 5 R, Reynolds Aff. at ¶¶ 19-20)

4. President Sloan's initial experience with Petitioner's work pre-dated his presidency. Dr. Sloan became the Dean of Baylor University's George W. Truett Theological Seminary in 1993. (5 R, Sloan Aff. at ¶ 3) In the fall of 1993, Baylor began to publicize the opening of the seminary in anticipation of the beginning of classes in the fall of 1994. (5 R, Sloan Aff. at ¶ 4) Dr. Sloan felt it was "like pulling teeth" to get Petitioner to have ads placed to

publicize the opening of the seminary. (*Id.*) On the opening day of classes at the new seminary, President Sloan could not get adequate coverage, and Petitioner assigned someone on his staff to attend rather than becoming involved himself. (*Id.*) During this process, President Sloan had great difficulty getting ads, a logo, a focus group to talk about a logo, or a photographer to take pictures of the first classes. (*Id.*) President Sloan found these experiences to be extremely frustrating and sapped any confidence he might otherwise have had in Petitioner's abilities. (*Id.*)

5. During the transition period, President Sloan intended that Petitioner would be removed as Vice President of Communications and Marketing through an administrative reorganization that would place Communications under University Relations. (5 R, Sloan Aff. at ¶ 5) President Sloan believed that Petitioner learned of these plans and went to members of the Board's Communications Committee seeking to have them intervene on his behalf. (*Id.*) The Chair of the Board's Communications Committee urged President Sloan to give Petitioner another chance. (*Id.*) President Sloan agreed to this request and the reorganization was not announced at that time as contemplated. (*Id.*)

6. President Sloan worked with Petitioner in the course of a "media blitz" in the summer of 1995 to acquaint alumni and other groups with Baylor's new president. (5 R, Sloan Aff. at ¶ 6) President Sloan believed the campaign went acceptably although he was not left with a particularly strong, favorable impression of Petitioner. (*Id.*) Indeed, President Sloan was struck by the fact that Petitioner was not good at public speaking, which he

perceived as a surprising shortcoming for someone serving as Vice President of Communications and Marketing. (*Id.*) President Sloan also concluded that Petitioner was planting rumors with the media about administration changes. President Sloan thus decided to move forward with his plans to shift Petitioner's area of responsibility under University Relations. (*Id.*)

7. At the conclusion of the "media blitz," President Sloan told Petitioner that he intended to make a change and gave Petitioner several alternatives to his current position. (5 R, Sloan Aff. at ¶ 7) These included remaining at Baylor as a tenured professor or, if he desired to leave Baylor and move on to a vice president-type position elsewhere, the opportunity to keep his salary and title for a certain period of time until he made that transition. (*Id.*) President Sloan informed Petitioner that the reason for the decision was that he was trying to build his own administration team. (*Id.*) President Sloan perceived Petitioner again attempted to lobby members of the Board of Regents to intercede on Petitioner's behalf, but the Board concurred with President Sloan's decision. (*Id.*) Petitioner ultimately decided that he wanted to stay at Baylor and serve as Chair of the Journalism Department. (5 R, Pl. Dep. at V. II, pp. 94-95)

8. Petitioner ceased to serve as a vice-president effective August 31, 1995. (5 R, Sloan Aff. at ¶ 7) Petitioner was only one of many persons affected by President Sloan's changes to Baylor's top administration. (5 R, Sloan Aff. at ¶ 10) Indeed, Dr. Donald Schmeltekopf was the only one of President Reynold's vice presidents who remained a vice president under President Sloan. President Sloan informed all others of his intent to make a

change in their position, and each retired, resigned voluntarily or, like Petitioner, was removed involuntarily.[2] (*Id.*)

Petitioner's Alleged Protected Activity

9. Petitioner claims that in early 1992 (while Petitioner was a vice president), Dr. Doug Ferdon, a Journalism professor, told him that the Journalism Department was divided and certain members of the department were harassing Sara Stone, another Journalism professor. (5 R, Pl. Dep. at V. I, p. 150) Shortly thereafter, Dr. Stone allegedly told Petitioner that she was being unfairly treated in an effort to force her out of the Journalism program. (5 R, Pl. Dep. at V. I, pp. 151-53)

10. In the early spring of 1992, Petitioner claims he told President Reynolds that the Journalism faculty was divided over the Department Chair's (Dr. Gould's) administrative practices and policies. (5 R, Pl. Dep. at V. I, p. 166) Because Drs. Stone and Ferdon approached Petitioner on a confidential basis, Petitioner did not identify their names or even mention their gender during the meeting with President Reynolds. (5 R, Pl. Dep. at V. I, pp. 164-65) The next conversation Petitioner and President Reynolds had on this matter was when President Reynolds telephoned Petitioner to say Dr. Gould had resigned, and President Reynolds was appointing Petitioner as the acting Chair of the Journalism Department.

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[2] President Sloan did not ask the Vice President of Student Life to resign; he voluntarily returned to the faculty. (5 R, Sloan Aff. at ¶ 10)

(5 R, Pl. Dep. at V. I, pp. 173-74) This occurred in or about December 1992. (5 R, Pl. Dep. at V. I, pp. 173-74)

11. The resignation of Dr. Gould as Chair did not resolve the discord in the Journalism Department. In the spring of 1994, Petitioner met with President Reynolds, Basil H. Thomson, Jr. (General Counsel), and others to discuss the continuing division within the department. (5 R, Pl. Dep. at V. I, pp. 174-76) At that meeting, Petitioner does not recall specifically identifying any issues regarding Dr. Stone, but recalls stating that division within the Journalism Department could be resolved by making faculty changes (*i.e.*, seeking the retirement of Baylor's four senior Journalism professors). (5 R, Pl. Dep. at V. I, p. 178)

12. During the same general time period, after discussions with Baylor's General Counsel, Petitioner agreed to meet with Dr. Stone as the Baylor administration representative in an effort to resolve Dr. Stone's complaints. (5 R, Pl. Dep. at V. I, pp. 187, 195 & V. II, pp. 30-32) Throughout these settlement discussions, Petitioner offered Baylor advice regarding settlement strategy and suggested possible settlement offers. (*See, e.g.*, 5 R, Reynolds Aff. at ¶¶ 13-16 & Exh. J)

13. Petitioner's final involvement was to send President Reynolds a memo which discussed settlement prospects in the Stone matter. (5 R, Pl. Dep. at V. I, p. 216 & Exh. 10) Afterwards, Petitioner does not recall any criticism regarding his role in the Stone matter, and he never discussed the matter with President Sloan. (5 R, Pl. Dep. at V. I, pp. 216, 221)

14. President Reynolds did not perceive that Petitioner was advocating Dr. Stone's side in any controversy

with Baylor or anyone else. (5 R, Reynolds Aff. at ¶ 13) Rather, President Reynolds assumed Petitioner was attempting to fulfill his responsibilities as a member of his cabinet. (5 R, Reynolds Aff. at ¶ 13) Indeed, during the Stone matter, Petitioner sent President Reynolds a letter that states Petitioner wanted his involvement in Dr. Stone's complaint to be "in whatever manner is most beneficial to the University." (5 R, Reynolds Aff. at ¶ 14 & Exh. J) President Reynolds was left with the obvious impression that Petitioner had been and intended to continue to advocate *Baylor's* position and interests with regard to Dr. Stone's complaint. (*Id.*)

15. There was no evidence in the summary judgment record that President Sloan was aware of the nature of Petitioner's activities with regard to the Stone matter.

REASONS FOR DENYING WRIT

1. Petitioner Has Waived His Right to Raise the Participation Clause.

Title VII recognizes two distinct categories of protected activity: (i) opposition to unlawful discrimination under Title VII; and (ii) participation in an investigation, proceeding or hearing under Title VII. *See* 42 U.S.C. § 2000e-3. Petitioner's Original Complaint focuses exclusively on alleged "opposition" to sex discrimination, and does not contain any allegations of retaliation based on participation in a statutorily protected activity. Specifically, Paragraph 54 of Petitioner's Original Complaint provides in pertinent part:

> Baylor's actions in terminating Bishop's employment . . . have violated the anti-retaliation provisions of 42 U.S.C. § 2000e, *et seq.* (Title VII), in that Bishop has *opposed* Baylor's unlawful discriminatory practices . . . and has spoken out in *opposition* to such practices and in support of those who have *opposed* such practices. . . . (emphasis added).

Petitioner's summary judgment response likewise focused exclusively on the "opposition" allegations pleaded in the Original Complaint. Indeed, the applicable heading of Petitioner's summary judgment response stated as follows: "PLAINTIFF CAN ESTABLISH A *PRIMA FACIE* CASE OF RETALIATION FOR OPPOSING GENDER-BASED DISCRIMINATION." Petitioner did not raise a participation clause argument until appeal to the Fifth Circuit. However, it is well-settled that issues raised for the first time on appeal will not be considered. *Dean v. Dean*, 837 F.2d 1267, 1268 (5th Cir. 1988) (citing cases); *United States v. Bigler*, 817 F.2d 1139, 1140 n.3 (5th Cir.) (on rehearing), *cert. denied*, 484 U.S. 842 (1987). Having failed to timely raise his participation clause argument in the courts below, Petitioner may not now assert it in this Court. *Sisson v. Ruby*, 497 U.S. 358, 359 n.1 (1990).

2. Petitioner Does Not Demonstrate a Split in Circuit Court Opinions on Any Material Issue in This Case.

Even if Petitioner had preserved the issue for review, it would be a waste of judicial resources to grant certiorari under the facts of the present case. Petitioner's Petition discusses at length a split in the circuit courts

concerning whether filing an EEOC charge is a prerequisite to protection under the participation clause. However, that legal question has no relevance here. It is undisputed that Journalism Professor Sara Stone filed an EEOC charge in the present case, and Petitioner represented Baylor during informal settlement negotiations after the charge was filed.[3] Petitioner's discussion of the circuit courts' differing views on the necessity of filing an EEOC charge under the participation clause is merely an attempt to mislead this Court into believing broad matters of legal importance attach to the present case.

Unable to show that he participated in "an investigation, proceeding or hearing under [Title VII]," Petitioner also claims his status as a faculty colleague, supervisor, University spokesperson, mediator, or potential witness equates to protected activity under Title VII. (Petition at 14) Yet, there is not a single case anywhere that equates an employee's status with protected activity. The relevant inquiry is what one has done, not who one is. At most, Petitioner acted as *Baylor's* representative during informal settlement discussions with Dr. Stone. There is no legal authority anywhere that would hold such discussions constitute an "investigation, proceeding or hearing under [Title VII]," and thus they cannot support a finding of protected activity under the participation clause. Accordingly, Petitioner's participation clause argument is

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[3] Petitioner does not seriously dispute the fact that his actions were not in opposition to alleged unlawful discrimination by Baylor. Indeed, Petitioner concedes he sent Baylor President Herbert Reynolds a letter that requested Petitioner's involvement in the Stone matter be "in whatever manner is most beneficial to the University."

not relevant, and the Court should deny Petitioner's Petition for Writ of Certiorari.

3. It Would Be Improvident to Grant the Petition Because Petitioner Has Otherwise Failed to Demonstrate Any Factual Basis for His Claim.

a. Failure to Establish Causal Connection.

Even assuming the existence of protected activity, it would be improvident to grant the Petition because Petitioner cannot provide sufficient evidence to establish a causal connection between any alleged protected activity and his removal as Vice President. Petitioner's alleged protected activity with regard to the Stone matter occurred between 1992 to 1994 while Herbert Reynolds was Baylor's President. Upon President Reynolds' retirement, Robert Sloan was named the new President of Baylor University, and President Sloan decided to remove Petitioner as Vice President during the transition to the new administration. Petitioner offered absolutely no admissible evidence that President Sloan ever knew of the alleged opposition or that connected President Sloan's removal decision with Petitioner's actions during the Reynolds administration. Moreover, President Reynolds unequivocally testified that he did not request that President Sloan remove Petitioner as Vice President, and President Sloan unequivocally testified that his decision to remove Petitioner as Vice President was not influenced by President Reynolds. The District Court and Fifth Circuit properly concluded that there was insufficient evidence to establish a causal connection between President

Sloan's removal decision and Petitioner's actions with regard to the Stone matter.

b. Failure to Establish Pretext.

Even assuming Petitioner could establish a *prima facie* case of retaliation by showing protected activity and the requisite causal connection, summary judgment remains appropriate based on Petitioner's failure to present evidence sufficient to show Baylor's legitimate reasons for his removal as Vice President were pretext for unlawful retaliation. *See Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097, 2106 (2000) (the plaintiff must offer sufficient evidence that defendant's proffered explanation is pretext for discrimination.); *Rios v. Rossotti*, 252 F.3d 375, 382 (5th Cir. 2001) (summary judgment affirmed where plaintiff failed to present evidence of pretext for discrimination or retaliation). As set forth in the Statement of Facts, with one exception, every single top administrator from President Reynolds' administration was replaced during the transition to President Sloan's administration. President Sloan also testified to his misgivings about Petitioner's performance as Vice President.

Petitioner offered no admissible evidence to refute Baylor's legitimate, non-retaliatory reasons for his removal as Vice President. Moreover, Petitioner did not even attempt to show that he was treated less favorably than a similarly-situated employee during the transition between administrations. Accordingly, it would be improvident to grant Petitioner's Petition for Review of

Certiorari in light of the fact that the ultimate outcome would remain unchanged.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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